

THE MARRIAGE (SAME SEX COUPLES) BILL
ADVICE

1. I am instructed on behalf of Coalition for Marriage Limited (“C4M”), a not for profit company committed to defending the current legal definition of marriage as between a man and a woman. I am asked to provide a written legal advice regarding the impact of redefining marriage on what would be taught in schools. In this regard, I have been provided with the following documents in order to inform my advice:
 - (i) The Government’s ‘Myth Buster’ document issued alongside the Bill on 25 January 2013;
 - (ii) Transcript of an interview with the Culture Secretary on the Today Programme, 25 January 2013;
 - (iii) A previous advice of Aidan O’Neill Q.C. commissioned by those instructing me;
 - (iv) An email from Jane Williams of the Department for Education dated 29 January 2013 in response to an email expressing concerns about the impact of the new Bill on education.

Background

2. On 25 January 2013, the UK Government published and introduced into Parliament the *Marriage (Same Sex Couples) Bill*. The Bill, if

enacted in its present form, would redefine the law of marriage to allow for same sex marriage. It would remove the gender requirements to marriage and provide for two sets of marriage rules within a new, wider definition of marriage – most notably the law relating to consummation and adultery will not be extended to same sex marriage. The Bill would keep the current legal definition of marriage only to a limited degree in that it would still subsist within Anglican canon law. Under the Bill, the Church of England will continue to marry parishioners according to the current legal definition of marriage.

3. The issue of marriage can arise across the school curriculum and in the ordinary discussions which take place in the classroom. I am instructed that some schools already seek to promote same sex unions in primary schools. Story books such as “Tango Makes Three”, “Daddy’s Room Mate” and “King and King” are already found in British primary schools and some titles have already been the subject of litigation brought by concerned parents in the United States. I am also instructed that Stonewall’s Education for All campaign is already promoting such resources in UK primary schools.
4. My Instructing Solicitor has had cause to advise a teacher who faced discipline because she declined to read such books to her class. Some schools have also endorsed the idea of LGBT History Month.
5. Teachers who conscientiously believe that marriage can only be between a man and a woman are supported in their beliefs by the current legal definition of marriage. However, those instructing me are concerned that the position will change if the *Marriage (Same Sex*

Couples) Bill (**‘the Marriage Bill’**) is enacted, such that teachers in state schools who hold to a belief in ‘traditional’ marriage will find that their views are at odds with the legal definition of marriage.

6. In addition, there is the very specific and troubling issue of sex and relationships education. This is more of an issue for secondary schools (where it is compulsory, unlike primary schools where it is not). The law currently provides for guidance so that children learn about the nature of marriage and its importance for family life and bringing up children.

The Marriage Bill

7. The *Marriage Bill* which applies to England and Wales but in its key provisions not Scotland or Northern Ireland¹, contains the following provisions relevant to this advice:
 - (i) Section (‘s’) 1(1) provides that marriage of same sex couples is lawful;
 - (ii) S.2(5) amends the Equality Act 2010 to the effect that a person will not contravene s.29 (prohibiting discrimination in the provision of services) if they refuse to conduct, be present at, carry out or otherwise participate in a relevant, i.e. same sex, marriage.

¹ Marriage is a devolved matter for Northern Ireland and Scotland and as such is a matter for the Northern Ireland Assembly and Scottish Parliament. It should be noted that some limited provisions of the Marriage Bill will affect Northern Ireland and Scotland: see the Explanatory Notes, §§16-22 (<http://www.publications.parliament.uk/pa/bills/cbill/2012-2013/0126/en/2013126en.htm>)

- (iii) Paragraph 1 of Schedule 3 provides that in existing legislation of England and Wales, a reference to “*marriage*” will be read as including a reference to the marriage of a same sex couple. Equivalent provision, redefining marriage terms to include the marriage of same sex couples, is made for reference to “*married couple*”, “*a person who is married*” and a “*marriage that has ended*” in existing legislation.
- (iv) Similarly, in new (but presumably not existing) England and Wales legislation, “*husband*” is to include a man married to another man, “*wife*” is to include a woman who is married to another woman and “*widower*” is to include a man whose marriage to another man ended with the other man’s death.
- (v) Paragraph 1 of Schedule 4 provides that s.11 does not alter the effect of any private legal instrument made before that section comes into force.

Human Rights Act 1998

8. The Human Rights Act 1998 (**HRA 1998**) provides that a public authority cannot act in a way which is incompatible with a Convention Right (s.6)². The relevant Convention rights for the purpose of this advice are Article 8 (protecting family and private life), Article 9 (freedom of thought, conscience and religion), Article 10 (freedom of expression), Article 12 (the right to marry), Article 14 (prohibition on discrimination) and Article 2 of the First Protocol (right to education).

² The ‘Convention Rights’ are defined by s.1; specifically, Articles 2 to 12 and 14 of the European Convention on Human Rights, articles 1 to 3 of the First Protocol and Article 1 of the Thirteenth Protocol, as read with Articles 16 to 18 of the Convention.

9. Section 2 of the HRA 1998 provides, amongst other things, that a court or tribunal determining a question which has arisen in connection with a Convention Right must “*take into account*” a judgment, decision or declaration or advisory opinion of the European Court of Human Rights.
10. Section 3 provides that so far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights. In relation to primary (e.g. an act of Parliament) or subordinate (e.g. a statutory instrument) legislation, a court can make a ‘declaration of incompatibility’ (s.4).

Relevant statutory provisions

11. Currently, section 403 of the Education Act 1996 gives a privilege to marriage in the school curriculum. The *Marriage Bill*, if it becomes an Act, would clearly widen the scope of the current legal duty on schools to promote marriage. Section 403(1A) provides that

(1A) The Secretary of State must issue guidance designed to secure that when sex education is given to registered pupils at maintained schools—

(a) they learn the nature of marriage³ and its importance for family life and the bringing up of children, and

³ My emphasis.

(b) they are protected from teaching and materials which are inappropriate having regard to the age and the religious and cultural background of the pupils concerned.

(1B) In discharging their functions under subsection (1) governing bodies and head teachers must have regard to the Secretary of State's guidance.

(1C) Guidance under subsection (1A) must include guidance about any material which may be produced by NHS bodies for use for the purposes of sex education in schools.

12. This provides no exception for conscientious beliefs. Unless this were amended I envisage that there would be a duty on the teacher to promote marriage as newly defined. This is further the case given that the issue of redefinition could not be avoided by any suggestion that such teaching might be said to be, in terms of 403(1A)(b), “*inappropriate having regard to the age and the religious and cultural background of the pupils concerned*”.

13. The importance of this is heightened by the fact that it would inevitably be taken into account by an employment tribunal in assessing what fell within the band of reasonable responses of an employer when it came to assess a claim for unfair dismissal (s84(2) Employment Rights Act 1996; *Post Office v Foley* [2000] IRLR 827).

14. The code of conduct for teachers in England (“Teachers’ Standards”, May 2012 published by the DfE and which replaces the General Teaching Council for England’s Code of Conduct and Practice for Registered Teachers) gives teachers some freedom in expressing

personal beliefs but within very clear limits. Under the heading “personal and professional conduct” this is found:

“Teachers uphold public trust in the profession and maintain high standards of ethics and behaviour, within and outside school, by...ensuring that personal beliefs are not expressed in ways which exploit pupils’ vulnerability or might lead them to break the law”. Further they must not undermine fundamental British values, including democracy, the rule of law, individual liberty **and mutual respect, and tolerance of those with different faiths and beliefs**

15. There are also two parts of the Equality Act 2010 (‘**EQA 2010**’) which fall to be considered. Chapter 6 Equality Act 2010 generally applies equality law to education.

16. Schools are prohibited from discriminating, harassing⁴ or victimising in relation to the protected characteristics except for (a) age and (b) marriage and civil partnership.⁵ So, for example, a school is not prohibited from allowing greater privileges to older pupils, or those who are married/in a civil partnership. A school is also prohibited from victimising for the conduct of parents or siblings (s.86).

17. Nothing in Chapter 1 of Part 6 (i.e. the rules relating to schools) applies to “*anything done in connection with the content of the curriculum*” (s.89(2)). The Explanatory Notes⁶ to EQA 2010 explain this provision as follows:

This ensures that the Act does not inhibit the ability of schools to include a full range of issues, ideas and materials in their syllabus and

⁴ For the purposes of the prohibition of harassment, the Act excludes gender reassignment, sexual orientation or religion or belief (s.85(10)).

⁶ Although admissible as an aid to construction, Explanatory Notes have not been endorsed by Parliament and cannot be decisive of the correct interpretation of the Act: see e.g. *R (S) v. Chief Constable of South Yorkshire* [2004] UKHL 39, *per* Lord Steyn at §4

to expose pupils to thoughts and ideas of all kinds. The way in which the curriculum is taught is, however, covered by the reference to education in section 85(2)(a), so as to ensure issues are taught in a way which does not subject pupils to discrimination.

[...]

Examples

- A school curriculum includes teaching of evolution in science lessons. This would not be religious discrimination against a pupil whose religious beliefs include creationism. [...]

18. On the other hand, Section 85(2)(a) of EQA 2010 provides that discrimination law does apply to the way education is provided. This extends to the protected characteristic of marriage which will of course be redefined (see section 84(b)).

19. As a public authority, the school (i.e. state schools) and the Local Education Authority are subject to the duties in Section 149 of EQA 2010 – amongst other things to provide equality of opportunity between persons who share and do not share a relevant protected characteristic. This means that the public authority, or a person who is not a public authority but exercises public functions must, in the exercise of its functions, have “*due regard*” to the need to:

- (a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;
- (b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;
- (c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

20. There is no requirement to conform with (b) and (c) above in relation to the protected characteristic of marriage and civil partnership. However, it is relevant to the other protected characteristics mentioned above.

21. Having “*due regard*” to the need to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to:

(a) remove or minimise disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic;

(b) take steps to meet the needs of persons who share a relevant protected characteristic that are different from the needs of persons who do not share it;

(c) encourage persons who share a relevant protected characteristic to participate in public life or in any other activity in which participation by such persons is disproportionately low.

22. Having due regard to the need to foster good relations between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to (a) tackle prejudice, and (b) promote understanding.

23. The following example is provided in the Explanatory Notes to EQA 2010 in relation to a school:

The duty could lead a school to review its anti-bullying strategy to ensure that it addresses the issue of homophobic bullying, with the aim of fostering good relations, and in particular tackling prejudice against gay and lesbian people.

24. This statutory background is hard to reconcile with the email from Jane Williams of the DfE which includes this “*no teacher can or should be compelled to promote views that go against their conscience*” or the Government’s ‘Myth Busting’ document, which states that “*No teacher will be required to promote or endorse views which go against their beliefs*”. The stark position in my view is that a Christian teacher (or indeed any teacher with a conscientious objection) may have to teach about (and positively portray) a notion of marriage (and its importance for family life) which they may find deeply offensive.

Obligations on teachers

25. This statutory position would in my view make it more difficult for those schools which currently seek to teach about marriage between different sexes (or present it in a positive way) to continue doing so without teaching similarly with regard to same sex marriage. Teachers as with every employee must carry out the reasonable instructions of their employers. This is however underpinned or overlaid in the case of education with the guidance from the Secretary of State to which I have already referred. A teacher could well be disciplined for his/her stance on the subject.

26. The Secretary of State's guidance on sex education⁷ makes clear that "*pupils should learn the significance of marriage and stable relationships as key building blocks of community and society. Care needs to be taken to ensure that there is no stigmatisation of children based on their home circumstances*". Pupils must also be "*given accurate information and helped to develop skills to enable them to understand difference and respect themselves and others and for the purpose also of preventing and removing prejudice.*" If the *Marriage Bill* is enacted, this would apply equally to same sex couples.

27. Secondly, elevating one kind of marriage over another is likely to amount to indirect or direct discrimination. For example, a pupil who is gay or whose parents are in a same sex union would arguably be treated less favourably if same sex marriage were denigrated explicitly or implicitly as part of a lesson. It is correct to say that the prohibition on discrimination does not apply to "*anything done in connection with the content of the curriculum*". However, it does apply as already stated to "*the way it provides education for the pupil*". This is a difficult distinction to draw.

28. It is therefore relatively clear from the above that a school would be entitled to teach that there is a wide range of views in relation to marriage, for example as expressed by different religions and religious denominations. But by teaching the topic "*in a way*" which subjects pupils to direct or indirect discrimination, which would in my view clearly include stating that one form of marriage⁸ is *better* than

⁷ DfEE 0116/2000, issued July 2000

⁸ Arguably, if the Marriage Bill becomes law, it will be incorrect to state there is more than one 'form' of marriage.

another, it is likely to amount to unlawful direct or indirect discrimination. The Equality and Human Rights Commission provide the following example⁹ which supports this interpretation:

During a PSHE (personal, social, health and economic education) lesson, a teacher describes homosexuality as ‘unnatural’ and ‘depraved’ and states he will only be covering heterosexual relationships in the lesson. A bisexual pupil in the class is upset and offended by these comments. This may be unlawful direct discrimination on the grounds of sexual orientation.

29. Clearly, there will be grey areas. What in practice amounts to teaching in a discriminatory way will be a matter of fact and degree. For example, in a Christian or Orthodox Jewish faith school it would (one assumes) be reasonable to teach the fact that the school’s religious denomination does not support and in fact rejects the principle of same sex marriage. But despite the best intentions of a teacher, merely teaching that there is a range of views and that *in the view of the school’s religious denomination*, same sex marriage is wrong, might lead a gay pupil or a pupil whose parents are in a same sex marriage to feel that they have been treated in a discriminatory way. Ultimately, whether a school has discriminated in such a scenario will be a matter of fact for the courts and tribunals, but given the provisions of EQA 2010, schools will be under a duty to ensure that the subject is taught sensitively and leave little room for misunderstandings of the type described above.¹⁰

30. I note that a comparable issue arose in relation to ‘homophobic’ booklets distributed at Roman Catholic schools in Lancashire in

⁹ *Education providers: Schools Guidance*: <http://www.equalityhumanrights.com/advice-and-guidance/education-providers-schools-guidance/>

February of last year. The Education Secretary explained the issue in similar terms as I have above in a letter in response to a complaint from the TUC, stating *inter alia*: “*If a school conveyed its beliefs in a way that involved haranguing, harassing or berating gay or lesbian pupil or group of pupils then this would be unacceptable in any circumstances and is likely to constitute unlawful discrimination*”.¹¹

31. Thirdly, schools are under a positive duty to advance equality of opportunity and foster good relations between people with different protected characteristics (EQA 2010 s.149). If a school curriculum explicitly presented marriage between people of the opposite sex as positive and marriage between people of the same sex as less positive or negative, there would be a strong case that the school was breaching the duty under s.149. Although ‘marriage and civil partnership’ is not a protected characteristic for the purpose of s.149, sexual orientation is, and there would be a strong argument that by presenting same sex marriage in a less positive light, the school would be failing, for example, to foster good relations between persons who share a relevant protected characteristic and those who do not share it.

32. Fourthly, for similar reasons as in relation to discrimination under the EQA 2010, a state school has a duty under the HRA 1998 not to act in a way which is incompatible with the Convention rights. This would include not discriminating because of sexual orientation under Article 14 with reference to Article 8. Moreover, in the light of the recent case law described below, it is highly unlikely that a domestic or indeed the European Court of Human Rights would accept that

¹¹ <http://ukhumanrightsblog.com/2012/02/22/michael-goves-full-letter-on-homophobic-teaching-materials-in-schools/>

discrimination was justified with reference to the right to freedom of expression or freedom of thought, conscience and religion.

33. The position of such a teacher may be linked with the notion that not to promote same sex marriage may itself be offensive to gay people. This has been considered (albeit on more extreme facts) in two recent European Human Rights case. The European Court of Human Rights in *Vejdeland v. Sweden* [2012] ECHR 1813/07 (Fifth Section, 9 February 2012) upheld the criminal conviction of the applicants who had entered a secondary school and distributed approximately a hundred leaflets in and on pupils' lockers which contained offensive statements about homosexuals. A school may thus feel under a duty to counter what it regards as homophobic attitudes within its school and within the wider society. At paragraph 55 the Court said

55. Moreover, the Court reiterates that inciting to hatred does not necessarily entail a call for an act of violence, or other criminal acts. Attacks on persons committed by insulting, holding up to ridicule or slandering specific groups of the population can be sufficient for the authorities to favour combating racist speech in the face of freedom of expression exercised in an irresponsible manner (see *Féret v. Belgium*, no. 15615/07, § 73, 16 July 2009). *In this regard, the Court stresses that discrimination based on sexual orientation is as serious as discrimination based on "race, origin or colour"* (see, *inter alia*, *Smith and Grady v. the United Kingdom*, nos. 33985/96 and 33986/96, § 97, ECHR 1999-VI).

34. Further in *International Centre for the Protection of Human Rights (INTERIGHTS) v. Croatia* the European Committee of Social Rights upheld a complaint that Croatian schools did not provide comprehensive or adequate sexual and reproductive health education for children and young people and the Committee held there to be a violation of Article 11(2) of the (revised 1996) European Social

Charter¹² as read in the light of the non-discrimination preamble to the European Social Charter¹³ in Croatia's provision of certain educational matters distributed to State schools, noting as follows:

These statements stigmatise homosexuals and are based upon negative, distorted, reprehensible and degrading stereotypes about the sexual behaviour of all homosexuals. Although the Government maintains that all curricula are taught in compliance with domestic law as well as international standards, it does not dispute the existence of the abovementioned statements. The Committee holds that such statements serve to attack human dignity and have no place in sexual and reproductive health education: as such, their inclusion in standard educational materials constitutes a violation of art.11(2) in the light of the non-discrimination clause of the Preamble to the Charter.

Promotion of equality

35. Section 403(1A) of the Education Act 1996 would also in my view provide a legitimate basis for schools or LEAs which wish to promote a particular vision of equality to require all teachers to teach materials which endorse same sex marriage. The position of the teacher who manifests a conscientious objection to doing so is not enviable. It would be analogous to the registrar of births, deaths and marriages who refused to engage in civil partnerships which invites consideration of the ECHR decision in Eweida and Others v UK -

¹² Article 11(2) of the revised European Social Charter is in the following terms:

Article 11—The right to protection of health

Everyone has the right to benefit from any measures enabling him to enjoy the highest possible standard of health attainable.

With a view to ensuring the effective exercise of the right to protection of health, the Contracting Parties undertake, either directly or in cooperation with public or private organisations, to take appropriate measures designed inter alia: . . .

2. to provide advisory and educational facilities for the promotion of health and the encouragement of individual responsibility in matters of health;...'

¹³ The non-discrimination clause of the Preamble to the Charter reads:

“Preamble

... Considering that the enjoyment of social rights should be secured without discrimination on grounds of race, colour, sex, religion, political opinion, national extraction or social origin
....”

48420/10 36516/10 51671/10 59842/10 - HEJUD [2013] ECHR 37.

The London Borough of Islington had a “Dignity for All” equality and diversity policy. In 2005 it designated all existing registrar of births, deaths and marriages as civil partnership registrars.

36. Initially, Ms Ladele was permitted to make informal arrangements with colleagues to exchange work so that she did not have to conduct civil partnership ceremonies. Ms Ladele’s refusal to carry out civil partnerships allegedly caused rota difficulties and put a burden on others and there had been complaints from homosexual colleagues that they felt victimised. No doubt similar complaints would be made of the teacher who refused to promote the new definition of marriage. She was told that her refusal to conduct civil partnerships put her in breach of the equality policy. Her claim for discrimination on grounds of religion or belief ultimately failed both domestically and at the ECHR.

37. The lack of protection for the conscientious objector can be seen in the Court of Appeal which stated, at paragraph 52:

“...the fact that Ms Ladele’s refusal to perform civil partnerships was based on her religious view of marriage could not justify the conclusion that Islington should not be allowed to implement its aim to the full, namely that all registrars should perform civil partnerships as part of its Dignity for All policy. Ms Ladele was employed in a public job and was working for a public authority; she was being required to perform a purely secular task, which was being treated as part of her job; Ms Ladele’s refusal to perform that task involved discriminating against gay people in the course of that job; she was being asked to perform the task because of Islington’s Dignity for All policy, whose laudable aim was to avoid, or at least minimise, discrimination both among Islington’s employees, and as between Islington (and its employees) and those in the community they served; Ms Ladele’s refusal was causing offence to at least two of her gay colleagues; Ms Ladele’s objection was based on her view of marriage, which was not a core part of her religion; and Islington’s requirement in no way prevented her from worshipping as she wished.”

38. The ECHR gave no more protection. The key features of the recent judgment for present purposes are

82 Even where the [religious] belief in question attains the required level of cogency and importance, it cannot be said that every act which is in some way inspired, motivated or influenced by it constitutes a “manifestation” of the belief. Thus, for example, acts or omissions which do not directly express the belief concerned or which are only remotely connected to a precept of faith fall outside the protection of Article 9 § 1 (see *Skugar and Others v. Russia* (dec.), no. 40010/04, 3 December 2009, BAILII: [2009] ECHR 2159 and, for example, *Arrowsmith v. the United Kingdom*, Commission’s report of 12 October 1978, 3 EHRR 218, Decisions and Reports 19, p. 5; *C. v. the United Kingdom*, Commission decision of 15 December 1983, 6 EHRR CD587, DR 37, p. 142; *Zaoui v. Switzerland* (dec.), no. 41615/98, 18 January 2001). In order to count as a “manifestation” within the meaning of Article 9, the act in question must be intimately linked to the religion or belief. An example would be an act of worship or devotion which forms part of the practice of a religion or belief in a generally recognised form. However, the manifestation of religion or belief is not limited to such acts; the existence of a sufficiently close and direct nexus between the act and the underlying belief must be determined on the facts of each case. In particular, there is no requirement on the applicant to establish that he or she acted in fulfilment of a duty mandated by the religion in question (see *Cha’are Shalom Ve Tsedek v. France* [GC], no. 27417/95, §§ 73-74, ECHR 2000-VII, 9 BHRC 27; *Leyla Şahin*, cited above, §§ 78 and 105; *Bayatyan*, cited above, § 111; *Skugar*, cited above; *Pichon and Sajous v. France* (dec.), no. 49853/99, *Reports of Judgments and Decisions* 2001-X).

105. The Court of Appeal held in this case that the aim pursued by the local authority was to provide a service which was not merely effective in terms of practicality and efficiency, but also one which complied with the overarching policy of being “an employer and a public authority wholly committed to the promotion of equal opportunities and to requiring all its employees to act in a way which does not discriminate against others”. The Court recalls that in its case-law under Article 14 it has held that differences in treatment based on sexual orientation require particularly serious reasons by way of justification (see, for example, *Karner v. Austria*, no. 40016/98, § 37, ECHR 2003-IX, [38 EHRR 24](#); *Smith and Grady*, cited above, § 90; *Schalk and Kopf v. Austria*, no. 30141/04, § 97, ECHR 2010, BAILII: [\[2010\] ECHR 1996](#)). It has also held that same-sex couples are in a relevantly similar situation to different-sex couples as regards their need for legal recognition and protection of their relationship, although since practice in this regard is still evolving across Europe, the Contracting States enjoy a wide margin of appreciation as to the way in which this is achieved within the domestic legal order (*Schalk and*

Kopf, cited above, §§ 99-108). Against this background, it is evident that the aim pursued by the local authority was legitimate¹⁴.

106. It remains to be determined whether the means used to pursue this aim were proportionate. The Court takes into account that the consequences for the applicant were serious: given the strength of her religious conviction, she considered that she had no choice but to face disciplinary action rather than be designated a civil partnership registrar and, ultimately, she lost her job. Furthermore, it cannot be said that, when she entered into her contract of employment, the applicant specifically waived her right to manifest her religious belief by objecting to participating in the creation of civil partnerships, since this requirement was introduced by her employer at a later date. On the other hand, however, the local authority's policy aimed to secure the rights of others which are also protected under the Convention. The Court generally allows the national authorities a wide margin of appreciation when it comes to striking a balance between competing Convention rights (see, for example, *Evans v. the United Kingdom* [GC], no. 6339/05, § 77, ECHR 2007-I, [46 EHRR 34](#)). In all the circumstances, the Court does not consider that the national authorities, that is the local authority employer which brought the disciplinary proceedings and also the domestic courts which rejected the applicant's discrimination claim, exceeded the margin of appreciation available to them. It cannot, therefore, be said that there has been a violation of Article 14 taken in conjunction with Article 9 in respect of the third applicant.

39. The importance of the analogy in this case is that there were no issues of practical discrimination against homosexuals in the facts of Ms Ladele's case. The legitimate aim was all about maintaining the terms of an equality policy. This is no doubt how a case would be framed in respect of a teacher who was disciplined for not sufficiently promoting same sex marriage in the classroom.

40. As to schools not providing sex education (I am instructed that primary schools are not obliged to do so), the position is less clear as there is no explicit duty under the Education Act 1996 to teach about the importance of marriage. However, in my view the Public Sector

¹⁴ My emphasis.

Equality Duty imposed under EQA 2010¹⁵ would provide a legitimate basis for including not just the *fact* of same sex marriage but also an *endorsement* of it as part of the curriculum. For example, a school may discover that pupils are being bullied as their same sex parents are married under the new definition of marriage, i.e. because of their parents' sexual orientation. The school would arguably be under a duty to explore ways to address this by way of the curriculum, for example by teaching materials which endorse or at the least seek to normalise same sex marriage. Indeed, this example mirrors one of the examples provided in the Equality and Human Rights Commission's *Public sector equality duty guidance for schools in England*.¹⁶

A primary school becomes aware that there may be an issue with homophobic bullying when a boy in reception is bullied for having same-sex parents. As a result, the head teacher asks all teachers to report incidents of homophobic bullying and name-calling. Information gathered shows that homophobic name-calling is focused in years 4, 5 and 6. **The head teacher asks pastoral staff to research curriculum resources and classroom strategies to tackle this issue...** Once pastoral staff have reported back to the head teacher, new measures are introduced to tackle bullying throughout the school.

41. Given that Parliament has decided explicitly to require secondary schools to promote marriage as part of sex education lessons, it seems eminently reasonable for schools or LEAs to decide to do this in other contexts. That being said, it would not be open to a school or an LEA to teach that same sex marriage was *better* than other types of marriage as this would amount to discrimination for the reasons stated above in relation to the opposite scenario.

¹⁵ Nb. From 6 April 2012 schools have been required to publish information showing how they comply with the equality duty and setting equality objectives.

¹⁶ See page 7,

http://www.equalityhumanrights.com/uploaded_files/pdfs/public_sector_equality_duty_guidance_for_schools_in_england_final.pdf

Discipline of teachers

42. If the *Marriage Bill* becomes law, schools could lawfully discipline a teacher who refused to teach materials endorsing same sex marriage. Given that a teacher has to obey reasonable instructions and that when sex education is given to registered pupils at maintained schools they must learn the nature of marriage I think that the employer could discipline on those grounds. Of course, individual situations will vary, and not all teaching materials will be ‘reasonable’ instructions; for example, I have already mentioned the case of materials which promote gay marriage *over* other forms of marriage, which may amount to discrimination against those who are not gay or lesbian. Further the right to freedom of expression would have to be balanced in respect of any instructions.

43. Unless Section 403(1A) of the Education Act 1996 is amended, the enactment of the new *Marriage Bill* would create a legal duty on schools to positively promote same sex marriage within sex and relationships education. Given that it arises from guidance given under statute I doubt that an SRE teacher would have the right to refuse to teach about the ‘importance’ of same sex marriage.

44. As already indicated above, the domestic (i.e. English and Welsh) courts have considered a number of recent cases involving employees who have for reasons of religious belief refused to perform certain duties at work, and were dismissed as a result. Generally, the domestic courts have been unsympathetic to employees and service providers whose have refused to provide services to homosexuals due to their

religious beliefs. Of the four cases which were recently considered by the European Court of Human Rights in *Eweida* the case of Gary McFarlane is relevant in addition to that of Ms Ladele already dealt with.

45. Mr McFarlane, also a Christian, believed that homosexuality was sinful and as a result was unwilling to counsel gay and lesbian couples in his job at Relate, a counselling service. He was summarily dismissed for gross misconduct and lodged a claim alleging direct and indirect discrimination. His claim was rejected by the Employment Tribunal and the Employment Appeal Tribunal upheld the decision. He was refused permission to appeal to the Court of Appeal in the light of the decision in *Ladele*.

46. The Strasbourg court rejected Mr McFarlane's complaint. It stated:

108. The Court accepts that Mr McFarlane's objection was directly motivated by his orthodox Christian beliefs about marriage and sexual relationships, and holds that his refusal to undertake to counsel homosexual couples constituted a manifestation of his religion and belief. The State's positive obligation under Article 9 required it to secure his rights under Article 9.

109. It remains to be determined whether the State complied with this positive obligation and in particular whether a fair balance was struck between the competing interests at stake (see paragraph 84 above). In making this assessment, the Court takes into account that the loss of his job was a severe sanction with grave consequences for the applicant. On the other hand, the applicant voluntarily enrolled on Relate's post-graduate training programme in psycho-sexual counselling, knowing that Relate operated an Equal Opportunities Policy and that filtering of clients on the ground of sexual orientation would not be possible (see paragraphs 32-34 above). While the Court does not consider that an individual's decision to enter into a contract of employment and to undertake responsibilities which he knows will have an impact on his freedom to manifest his religious belief is determinative of the question whether or not there been an interference with Article 9 rights, this is a matter to be weighed in the balance when assessing whether a fair

balance was struck (see paragraph 83 above). However, for the Court the most important factor to be taken into account is that the employer's action was intended to secure the implementation of its policy of providing a service without discrimination. The State authorities therefore benefitted from a wide margin of appreciation in deciding where to strike the balance between Mr McFarlane's right to manifest his religious belief and the employer's interest in securing the rights of others. In all the circumstances, the Court does not consider that this margin of appreciation was exceeded in the present case.

47. As in Ms Ladele's case, the Court ruled that the employer's anti-discrimination policy was paramount in the balancing exercise, and that states had a wide margin of appreciation in deciding how to secure the rights of others even at the expense of religious belief. There is no reason in principle why this would not apply equally to a teacher refusing to teach about the importance of marriage between gays and lesbians, an instruction which would be underpinned by EQA 2010 and more generally attempts to minimise discrimination.

48. It should be noted that none of the recent cases on the refusal of services to homosexuals has yet reached the Supreme Court. However, the court is due¹⁷ to hear an appeal against *Bull & Bull v Hall & Preddy* [2012] EWCA Civ 83, in which the Court of Appeal upheld a ruling that Christian hotel owners had discriminated against a gay couple by refusing to provide them a double room in their hotel. The Court of Appeal followed the reasoning in *Ladele* and *McFarlane*, albeit before the European Court of Human Rights had ruled on the cases. Following the decision in *Eweida*, it seems unlikely that the Supreme Court will decide any differently than the Court of Appeal.

¹⁷ <http://www.bbc.co.uk/news/uk-england-cornwall-19263265>

Summary

49. In summary my answers to the questions posed are:

(1) - In relation to teaching in general, would the enactment of the Marriage (Same Sex Couples) Bill

a. Make it more difficult for those schools which currently seek to teach about marriage or present it in a positive way to continue doing so without teaching similarly with regard to same sex marriage?

Yes. This can be seen from a number of sources.

b. Provide a legitimate basis for schools or LEAs which wish to promote a particular vision of equality to require all teachers to teach materials which endorse same sex marriage?

Yes. For the reasons stated above in relation to the duties under the Education Act 1996.

c. Make it more difficult for a teacher with a conscientious objection to same sex marriage to express his or her views in the classroom?

In short, yes. Although teachers have a qualified right to express their personal views, a teacher who expressed their own view would have to be very careful not to do so in a way which potentially led to discrimination against pupils on grounds of sexual orientation.

2. If the Marriage (Same Sex Couples) Bill becomes law, would schools be within their rights to discipline a teacher who refused to teach materials endorsing same sex marriage?

Yes, probably, although much will depend on the particular facts of the case.

3. Specifically in relation to sex and relationships education, would the enactment of the Marriage (Same Sex Couples) Bill create a legal duty on schools to positively promote same sex marriage within SRE?

Yes.

4. Would an SRE teacher have the right to refuse to teach about the 'importance' of same sex marriage?

This would depend on the particular circumstances. However, if this were part of an SRE lesson about the importance of marriage generally, schools and teachers have a legal duty to promote marriage and this would include same sex marriage.

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